(19)

Office - Supreme Court, U. S.
FILED
AUG 13 1941
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1941.

314-617

No. 520.

CASSIUS McDONALD, PETITIONER,

VS.

ROBERT H. HUDSPETH, WARDEN, UNITED STATES PENITENTIARY, LEAVENWORTH, KANSAS, RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.

PETITION FOR WRIT OF CERTIORARI, BRIEF AND SUGGESTIONS IN SUPPORT THEREOF.

JOHN RHODES,
2500 Fidelity Building,
Kansas City, Missouri,
Attorney for Petitioner.

BOWERSOCK, FIZZELL & RHODES,
Kansas City, Missouri,
Of Counsel.

INDEX

PETITION FOR WRIT OF CERTIORARI

Summary Statement of Matter Involved 1

Reasons Relied On for the Allowance of the Writ 8

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I. Opinion of the Court Below 9

II. Jurisdiction 10

A. Venue of trial 11

B. Assistance of counsel 15

TABLE OF CASES

Achtien vs. Wood, 117 F. 2d 989, 992 (7th Cir., Evans, J.) (Feb., 1941) 17

Avery vs. State of Alabama, 308 U. S. 444, 60 S. Ct. 321 ..... 16, 17, 18

Brown vs. Elliott, U. S. Marshal, and Moore vs. Elliott, U. S. Marshal, 32 S. Ct. 812 ..... 11, 14

Fleenor vs. Hammond, 116 F. 2d 982, 985 17

Johnson vs. Zerbst, 304 U. S. 458, 58 S. Ct. 1019 16

McDonald vs. United States, 89 F. 2d 128 4

Powell vs. Alabama, 287 U. S. 45, 68-71, 53 S. Ct. 55, 77 L. Ed. 158, 83 A. L. R. 527 ..... 16, 17

Thomas et al. vs. District of Columbia, 90 F. 2d 424 (U. S. C. A. for D. C., 1937) 16

Zahn vs. Hudspeth, 102 F. 2d 759, 761 18

STATUTES

18 U. S. C. A., Sec. 408 (a) (c) 2

18 U. S. C. A., Sec. 408 (c) as amended January 24, 1936 8

CONSTITUTION

Constitution of the United States, Sixth Amendment 10, 14, 15, 16, 18

Supreme Court of the United States

OCTOBER TERM, 1941.

No. .....

CASSIUS McDONALD, PETITIONER,

VS.

ROBERT H. HUDSPETH, WARDEN, UNITED STATES PENITENTIARY, LEAVENWORTH, KANSAS, RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

SUMMARY STATEMENT OF MATTER INVOLVED.

Your Petitioner, Cassius McDonald, respectfully alleges:

This case challenges the validity of the trial and conviction of Petitioner in the United States District Court for the District of Minnesota, as an alleged conspirator to kidnap one Edward George Bremer in violation of the provisions of that certain Act of Congress approved June 22, A. D. 1932, forbidding the transportation of any person in interstate or foreign commerce, who shall have been kidnapped, or otherwise unlawfully detained (18 U. S. C. A., Sec. 408 (a) (c)).

The indictment charged:

> "That heretofore, to-wit: Between September fifteenth, A. D. 1933, or thereabouts, and January fifteenth, A. D. 1935, or thereabouts, the Grand Jurors being unable to fix the period of time more definitely, at the City of Saint Paul, in the County of Ramsey, in the State and District of Minnesota, and within the jurisdiction of this Court, and elsewhere in said State and District of Minnesota at places therein unknown to the Grand Jurors, and at the town or city of Bensenville, in the County of Du Page, in the State of Illinois, and elsewhere in said State of Illinois at places therein to the Grand Jurors unknown, and at various other places specifically mentioned hereinafter,
>
> One Alvin Karpavicz, alias Alvin Karpis, and
> One Arthur Barker, alias 'Doc' Barker, and
> One Volney Davis, and
> One Harry Campbell, alias George Winfield, and
> One William Weaver, alias Phoenix Donald, and,
> One William J. Harrison, and
> One Harry Sawyer, alias Harry Sandlovich, and
> One Byron Bolton, alias Monty Carter, and
> One Elmer Farmer, and
> One Harold Alderton, alias Harold Allerton, and
> One Cassius McDonald, alias 'Cash' McDonald,

then and there being, all of the foregoing persons being defendants herein and hereinafter being referred to individually and/or collectively as 'defendants', unlawfully did conspire, confederate and agree together and with each other and with various and divers other persons then and there being whose names are unknown to the Grand Jurors and with the following late decedents, namely

One Fred C. Goetz, alias George Ziegler, and
One Fred Barker,

both of whom were living beings during the period of time hereinbefore alleged, to violate the provisions of that certain Act of Congress approved June 22, A. D. 1932, 'Forbidding the transportation of any person in interstate or foreign commerce, kidnap, or otherwise unlawfully detained * * *' "

Then followed a detailed statement of the acts of the conspirators which, in substance, charged a conspiracy to kidnap Edward George Bremer in the city of St. Paul, Minnesota, the selection of a hide-out outside of the State of Minnesota, and his transportation thereto and retention therein. It was agreed that they would hold him for a ransom of $200,000; that they would communicate by means of notes and letters with friends of the victim with reference to the payment of the ransom money and his release; that after the payment of the ransom money they would return the victim secretly by automobile to the State of Minnesota from their hide-out in the State of Illinois; that after having collected the ransom money, in order to avoid discovery and arrest in connection therewith and to the end that they might safely realize and enjoy the profits and fruits of their crime, they would convert the ransom money at various places in the United States and Cuba, deemed by them to be propitious for that purpose, into other money and currency which they would be able to negotiate and pass readily and with safety to themselves in the regular and ordinary channels of trade, commerce and business; and that to accomplish the conversion and disposal and exchange of the

ransom money they would aid, abet, assist and counsel one another, in that connection and to that end.

The indictment set forth fourteen overt acts committed in consummation of the conspiracy. Overt Act 11 charged that on September 2, 1934, Petitioner traveled from Miami, Florida, to Havana, Cuba, to negotiate the exchange of ransom money. Overt Act 12 charged that on September 5, 1934, at Havana, Cuba, Petitioner exchanged a portion of the ransom money paid to defendants for the release of Edward George Bremer, for $11,000 more or less, in gold. Overt Act No. 13 charged that on September 9, 1934, Petitioner and defendant William J. Harrison traveled from Miami, Florida, to Havana, Cuba, to negotiate for the exchange of ransom money paid for the release of Edward George Bremer. Overt Act No. 14 charged that on September 10, 1934, at Havana, Cuba, Petitioner exchanged $72,000 more or less, of ransom money paid to defendants for the release of Edward George Bremer for other currency of the United States of One Thousand and Five Hundred Dollar denomination.

Petitioner was tried jointly with two other defendants. He was found guilty and appealed from the judgment and sentence of the court to the Eighth Circuit Court of Appeals, where his conviction was affirmed. *McDonald* v. *United States,* 89 F. 2d 128.

After the affirmance of the conviction by the Eighth Circuit Court of Appeals, Petitioner applied to the Supreme Court of the United States for a Writ of Certiorari, which was denied, and thereafter a plea of his wife addressed to the Supreme Court of the United States was treated as a Writ of Coram Nobis and was denied.

At no point in those proceedings were the questions, later presented on petition for Writ of Habeas Corpus, presented to any court. The then attorneys for Petitioner did not raise the questions later raised on Petition for Writ of Habeas Corpus, and raised in this Petition for Writ of Certiorari.

After his indictment, *supra*, on September 27, 1935, in the District of Minnesota, Petitioner was tried in the United States District Court at St. Paul, Minnesota, in January, 1936, and was, on the 26th day of January, 1936 convicted, and thereafter sentenced to fifteen years in the Federal Penitentiary at Leavenworth, Kansas. In 1938, as soon, so this Petitioner alleges, as he was permitted by the rules of said prison to do so, he filed his Petition for Writ of Habeas Corpus in the United States District Court for the District of Kansas (R. 9), as first amended (R. 21), as supplemented (R. 25), and as second amended (R. 28). Testimony was taken extensively and hearings had, and on the 6th day of June, 1940, a Writ of Habeas Corpus was issued by the United States District Court for the District of Kansas, and Petitioner was discharged on a recognizance bond. The Government appealed from such decision to the United States Circuit Court of Appeals for the Tenth Circuit, which Court on the 12th day of June, 1941, reversed the trial court and directed the return of the Petitioner to the Warden of the United States Penitentiary at Leavenworth, Kansas.

The trial of Petitioner in the United States District Court for the District of Minnesota developed these facts:

1. The United States Attorney stated in open court that Petitioner had nothing whatever to do with the actual kidnapping of Bremer.

2. The Petitioner was not heard of in connection with the case in any way until the dates on which it was alleged he committed the overt acts charged in the indictment in September, 1934, some eight months after the kidnapping took place.

3. No evidence was offered by the Government that Petitioner, or anyone for him, had any communication in any form with anybody at any time or place in connection with the kidnapping, or with anyone connected

with the kidnapping, either before or after the kidnapping *except* exceedingly scant proof was offered that Petitioner was casually with one or two of the kidnappers in Miami, Florida, in September, 1934, at about the time he was alleged to have committed the overt acts, with the doing of which he was charged in the indictment, but no proof was offered that Petitioner knew them as such, and they in fact had other names.

4. That Petitioner did go from Miami, Florida, to Havana, Cuba, on the dates charged in the indictment, and did there exchange money as charged in the indictment, but there was no proof offered that the money so exchanged was in fact ransom money used in the Bremer kidnapping, except some length of time thereafter, there was found in the Cuban Treasury $12,700 of the ransom money under a paper band, serving the function of an elastic, which packet of money had come from one of the banks in Cuba at which Petitioner had in fact exchanged money, but no proof was offered that he in fact exchanged that particular money, or that he knew it was ransom money.

5. That one Jennings, who was employed by Petitioner's wife as counsel for Petitioner, was continuously drinking, and was drunk throughout the trial of Petitioner.

6. That Petitioner asked and received permission to substitute other counsel, but other counsel did not show up.

7. That Petitioner did not at any time waive his right to have counsel, but on the contrary did all he could to procure competent counsel.

It further appears from the evidence taken in the habeas corpus proceeding:

1. That Petitioner was not permitted by his counsel (drunk) to take the stand in his own defense to explain his actions;

2. That Petitioner's drunken counsel declined to use witnesses who had been procured by the wife of Petitioner, and who, if used, would have shown by oral and documentary proof that Petitioner had for a long number of years conducted a legitimate business in Cuba (*i. e.*, he and others owned—Petitioner by inheritance from his father—the gambling concessions granted and sold by the Cuban government), and was, in September, 1934, on the dates charged in the overt acts in the indictment, in Florida and Cuba in connection with such business, and, specifically to make required payments on a mortgage on such business, and it was necessary in the conduct of such business for Petitioner to handle large sums of money, which he commonly did, and had been doing for a long number of years, which sums were handled by Petitioner in the cages of the banks in Cuba, he being known to and being friendly with all the bank officials there and officers of the Cuban government.

3. That Petitioner was also indicted in Florida, prior to his indictment in Minnesota, but was not there tried, his indictment being dismissed after his conviction in Minnesota, but others indicted with Petitioner at the same time in Florida were tried there, and the trial court instructed a verdict of acquittal at the close of the Government's case;

4. That defense counsel for otners indicted and tried at the same time in the United States District Court for the District of Minnesota gave their depositions in the habeas corpus proceedings, wherein they definitely say that Jennings, Counsel for Petitioner, was constantly drinking and was drunk throughout the trial of the case, and that in their opinion, Petitioner did not have assistance of counsel in the trial of the case there;

5. That whilst Petitioner was charged with a conspiracy, the only proof was of an overt act in Florida and Cuba, which overt act was the passing of ransom money,

which act was not at the time of commission in itself a crime, and did not become so until January, 1936, on the very day of the close of the trial of Petitioner in St. Paul, Minnesota, when Congress amended the Kidnapping Act in that particular (18 U. S. C. A. 408c as amended January 24, 1936).

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

Petitioner sought release on habeas corpus on the grounds:

1. That the United States District Court for the District of Minnesota had no jurisdiction of the offense charged against him for the reason that, whilst the indictment charged a conspiracy in Minnesota, no conspiracy was proved there. If a conspiracy were proved at all, which Petitioner denies, the verdict of the jury to the contrary notwithstanding, it was proved in Florida and/or Cuba and not in Minnesota, and that while trial venue may be laid *either* where the conspiracy *or* the overt act is executed, a trial court may not *retain* jurisdiction to sentence one charged with a crime unless a crime (*i. e.*, conspiracy here) is proved to have taken place in the District wherein the trial is being held.

2. That the United States District Court for the District of Minnesota had no jurisdiction to sentence Petitioner for the further reason that Petitioner did not have effective assistance of counsel, and did not waive assistance of counsel.